

# **Unprincipled Disobedience: the Doctrine of the Russian Constitutional Court after the *Yukos* case.**

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This article critically analyses the reasoning of the Russian Constitutional Court in its decision concerning the enforceability of the judgment of the European Court of Human Rights in *Yukos v Russia*. The Russian Court declared the *Yukos* judgment impossible to execute in Russia as it contradicts the Russian Constitution. The reasons put forward by the Russian judges are profoundly problematic from the perspective of constitutional and international law, and this article seeks to highlight their fragility.

## I. INTRODUCTION

On 19 January 2017, the Russian Constitutional Court (RCC) delivered a decision<sup>1</sup> concerning the execution of the European Court of Human Rights (ECtHR)'s judgment against Russia in the *Yukos* case.<sup>2</sup> In this decision, the RCC answered the Ministry of Justice's official request to consider whether Russia could, under its Constitution, comply with the ECtHR's order to pay just satisfaction to the applicant.

The RCC found that Russia's compliance with the ECtHR's decision would breach its Constitution and the judgment was, therefore, 'impossible to execute'. This decision forms part of a raising trend of States – chief among them the Russian Federation – expressing disobedience<sup>3</sup> towards the ECtHR's judgments. In the *Yukos* case, the legal reasons offered in the decision raise doubts about the genuine motivations of the RCC.

## II. RCC'S YUKOS JUDGMENT

### A. *The Background – ECtHR and Arbitral Proceedings*

The proceedings before the Strasbourg Court had been brought by the company *Yukos* (in its liquidated incarnation) in the wake of the State-driven process of tax assessment, auctioning and liquidation which resulted, ultimately, in the dissolution of the company and the nationalisation of its assets. In 2011, the Chamber of the ECtHR concluded<sup>4</sup> that Russia breached the applicant's right to property, protected under Article 1 of Protocol 1 to the Convention, in two respects. First, Russia lifted retroactively the statutory three-year time bar which would have otherwise protected *Yukos* from the tax audit relating to year 2000.<sup>5</sup> Second, the tax authorities imposed on *Yukos* a 7% enforcement fee, calculated on the total tax debt. Russia's refusal to reduce its amount or grant *Yukos*'s requests to postpone its payment accelerated the company's demise.<sup>6</sup>

Russia did not request that the case be referred to the Grand Chamber. It is difficult to divine the reason of Russia's yielding stance. Perhaps, it considered the judgment a partial success (most of the applicants' claims were rejected by the Court) and it chose to devote its efforts to the parallel arbitral proceedings hinging on the same facts, which had by then proceeded to the merits and in which *Yukos*'s majority shareholders were claiming more than US\$ 114 billion.<sup>7</sup> On 18 July 2014, the arbitral tribunal, constituted at the Permanent Court of Arbitration in The Hague, found Russia in breach of the Energy Charter Treaty and ordered it to pay more than US\$ 50 billion to the

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<sup>1</sup> *Judgment of 19 January 2017 No. 1-II/2017 in the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 31 July 2014 in the case of OAO Neftyanaya Kompaniya Yukos v Russia in connection with the request of the Ministry of Justice of the Russian Federation*. A courtesy translation is available on the website of the Russian Constitutional Court, and all quotations will be drawn from it, unless otherwise noted <[http://www.ksrf.ru/en/Decision/Judgments/Documents/2017\\_\\_January\\_19\\_1-P.pdf](http://www.ksrf.ru/en/Decision/Judgments/Documents/2017__January_19_1-P.pdf)>.

<sup>2</sup> *OAO Neftyanaya Kompaniya Yukos v Russia*, App No 14902/04, Judgment of 20 September 2011.

<sup>3</sup> See, P Popelier, S Lambrecht and K Lemmens (eds), *Criticism of the European Court of Human Rights* (Intersentia 2017).

<sup>4</sup> *OAO Neftyanaya Kompaniya YUKOS v Russia* (n 2).

<sup>5</sup> Liability relating to that year resulted in the company being considered a repeat offender for the following year's assessment, a finding causing the penalties to double.

<sup>6</sup> *OAO Neftyanaya Kompaniya YUKOS v Russia* (n 2) para 655.

<sup>7</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227 (claims brought under the Energy Charter Treaty), see Final Award of 18 July 2014, para 110.

claimants.<sup>8</sup> The claimants tried to pre-empt any Russian objection of double recovery, and pledged to deduct from said amount ‘any pecuniary damages ... [subsequently] awarded to Yukos in the ECtHR proceedings’ that they would actually receive.<sup>9</sup> The arbitral tribunal expressly chose not to address this risk in the award.<sup>10</sup> The award was set aside by a Dutch court in 2016,<sup>11</sup> with a decision that is currently under appeal.<sup>12</sup>

A couple of weeks later, the ECtHR considered the question of just satisfaction and ordered Russia to pay EUR 1,866,104,634 to the applicant, the highest amount ever awarded in Strasbourg.<sup>13</sup> Also, the ECtHR rejected Russia’s arguments regarding the risk of double recovery.<sup>14</sup> This time, the Russian authorities requested the referral of the judgment to the Grand Chamber, perhaps surprised by the magnitude of the award and concerned about the lack of any safeguard against double-recovery.<sup>15</sup> The request was declined, and the government publicly criticised the decision.<sup>16</sup>

The Ministry of Justice of Russia subsequently questioned the constitutionality of such payment. It noted that the findings of the ECtHR, and the attending obligation to compensate a large cohort of Yukos’s shareholders who had not partaken in the Strasbourg proceedings, would contravene the Russian Constitution, as interpreted by the RCC. The question was presented to the RCC and occasioned the decision annotated here.

### B. The Decision

At the outset, the RCC noted that the Convention forms part of the Russian legal system<sup>17</sup> and that Russia is obliged to execute the ECtHR’s judgments. This commitment applies even when the ECtHR uses evolutionary or teleological interpretation and deviates from its own case-law.<sup>18</sup>

Thereupon, the Russian judges qualified that premise. They opined that the relationship between the Russian legal order and the ECHR’s cannot be one of ‘subordination’: some degree of dialogue

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<sup>8</sup> *ibid* para 1823. For a comparison between the arbitral award and the decisions of the ECtHR, see E De Brabandere, ‘Yukos Universal Limited (Isle of Man) v The Russian Federation1: Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals’ (2015) 30 ICSID Review 345-355

<sup>9</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation* (n 7) para 1266.

<sup>10</sup> *ibid* para 1828-1829.

<sup>11</sup> *The Russian Federation v Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited*, 20 April 2016, the District Court of The Hague (C/09/477160/HA ZA 15-1, 15-2, and 15-112).

<sup>12</sup> In the meanwhile, recognition and enforcement proceedings are pending in several jurisdictions, see for instance *Hulley Enterprises Ltd. et al v The Russian Federation*, Memorandum Opinion of the US District Court for the District of Columbia, Civil Action No. 14-1996 (BAH), 30 September 2016.

<sup>13</sup> *OAO Neftyanaya Kompaniya Yukos v Russia* (just satisfaction), App No 14902/04, Judgment of 31 July 2014.

<sup>14</sup> *ibid* see para 43-44. Para 43 belies the close chronological succession of the two decisions, noting mistakenly that in the PCA proceedings ‘no final award has been adopted so far.’

<sup>15</sup> Which, had it been included in either decision, would have essentially absorbed the amount of the ECtHR-ordered satisfaction into the far bigger liability arising from the arbitration, rendering the ECtHR decision largely irrelevant.

<sup>16</sup> The Minister of Justice of Russia pointed out that the *Yukos* judgement is based on systemic legal errors, and these errors cast doubts on the prospect of acceptance of this judgment in Russia. See, ‘The ECtHR Judgment on Compensation to Yukos Shareholders Was Deemed Groundless by the Ministry of Justice (Interfax news, 15 June 2015) (Решения ЕСПЧ о компенсациях акционерам ЮКОСа Минюст счел безосновательным) <<http://www.interfax.ru/russia/447571>>’ (in Russian, translated by the authors).

<sup>17</sup> Article 15(4) of the Constitution of the Russian Federation states that the universally-recognised norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

<sup>18</sup> *Judgment of 19 January 2017* (n 1) 5.

must inform it to preserve the ‘appropriate balance.’<sup>19</sup> The RCC stated that the effectiveness of the Convention ‘depends’ on the ECtHR’s respect for national constitutional identity.<sup>20</sup> Ultimately, the RCC ‘reserv[es]’ for itself the right to determine Russia’s ‘degree of readiness’<sup>21</sup> to the judgments coming from Strasbourg. This reservation is essential to preserve the ‘compromise’<sup>22</sup> between the two legal orders, on which the Convention’s system is built.

The RCC explored the scenario in which the compatibility between constitutional law and international obligations, assured at the time of accession to a treaty regime, is subsequently undermined through the interpretive activity of an international body.<sup>23</sup> In this scenario, the principle of Article 26 VCLT (*pacta sunt servanda*) would not suffice to elicit unconditional compliance with international decisions. In particular, Russia would be ‘entitled as an exception’<sup>24</sup> to non-compliance when the ECtHR’s interpretation of the Convention contradicts the Constitution and, at the same time, does not follow the canons of treaty interpretation (because it is ‘[un]usual’, or runs contrary to the Convention’s object and purpose).

The Court identified one such exceptional scenario in the situation at hand. It took notice of a conflict between the Constitution and the Convention resulting not so much from the Convention’s text but from the ECtHR’s interpretation thereof. The RCC added that the Russian measures deemed unlawful by the ECtHR had been legitimately passed by the legislator and their constitutionality had been previously confirmed by the RCC.

Indeed, in 2005<sup>25</sup> the RCC upheld the constitutionality of a ‘differentiated approach’ to the application of the statutory period of limitation for tax crimes.<sup>26</sup> Namely, it approved the imposition of sanctions over crimes for which the period of limitation had expired, if the taxpayer had obstructed tax inspections. In so doing, the RCC said to have authorised the application of a constitutionally-oriented reading of the Tax Code, which did not contravene the principle of non-retroactivity of tax law.<sup>27</sup>

As a result, the RCC held that payment of the monetary award to the shareholders of a large-scale tax evader would contradict the ‘constitutional principles of equality and justice in tax relations’.<sup>28</sup> The unfairness would stem from the fact that the majority shareholders, who were responsible for the company’s wrongdoing, would be the main beneficiaries of the ECtHR’s order of just satisfaction.<sup>29</sup> In essence, the RCC noted that the shareholders’ losses brought before the ECtHR

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<sup>19</sup> *ibid* 6.

<sup>20</sup> *ibid*.

<sup>21</sup> *ibid*.

<sup>22</sup> *ibid*.

<sup>23</sup> *ibid* 7.

<sup>24</sup> *ibid* 9.

<sup>25</sup> *Judgment of 14 July 2005 No. 9-II in the case concerning the review of the constitutionality of the provisions of Article 113 of the Tax Code of the Russian Federation, in connection with a complaint of G.A. Polyakova and upon a request of the Federal Arbitration Court of the Moscow Circuit.*

<sup>26</sup> Article 113 of the Tax Code of the Russian Federation.

<sup>27</sup> Article 57 of the Constitution of the Russian Federation.

<sup>28</sup> *Judgment of 19 January 2017* (n 1) 20, referring to Article 17, Section 3; Article 19, Sections 1 and 2; Article 55, Sections 2 and 3; Article 57 of the Constitution of the Russian Federation.

<sup>29</sup> *ibid* 21.

were the result of the shareholders' negligence or bad faith, and that compensation would be inappropriate.

Similar arguments applied to the breach of Article 1 of Protocol 1 entailed by the modalities of the enforcement process, including the 7% enforcement fee. The RCC had already reviewed the constitutionality of the enforcement fee in 2001.<sup>30</sup> In that occasion, the RCC acknowledged the punitive character of the said fee and that its application should be flexible: 7% was in fact a maximum rate, applicable only in the most serious cases. The use of the highest fee and the refusal to delay its payment were, however, justifiable in the procedure against Yukos, since the company's evasion scheme 'directly threatened the principles of the law-governed democratic social State'.<sup>31</sup>

The RCC hence concluded that enforcement of the ECtHR would infringe on the constitutional principle of equality in fiscal matters.<sup>32</sup>

The RCC, after declaring the unconstitutionality of paying the compensation ordered by the ECtHR, declared that it would explore the possibility of a 'lawful compromise' in order to preserve the system.<sup>33</sup> Namely, it did not rule out the possibility of the Government showing goodwill in providing some relief to the shareholders who suffered from unlawful actions of the company and its management.<sup>34</sup> Such payment, however, would not be drawn from the Russian budget but, for instance, from the assets which Yukos might still conceal abroad.<sup>35</sup>

### III. COMMENT

Ultimately, the RCC found a contradiction between Russia's obligation to honour the ECtHR's 2014 judgment and its mandate as constitutional gatekeeper. In essence, the contradiction arose because the measures found to breach the Convention had been previously found to be constitutional. On the surface, the conflict is characterised as one between the Convention and the Constitution, and so it is presented in the *dispositif*. However, if one strips the RCC's reasoning to the bone, the only conflict at hand is between the Convention (as interpreted in Strasbourg) and Russian *statutory* law (as interpreted in Saint Petersburg, where the RCC sits). This conflict is more difficult to accept as the sufficient reason for the RCC's decision of non-compliance: Article 15(4) of the Russian Constitution unambiguously provides for the application of international law over conflicting domestic statutory laws.<sup>36</sup> Whether those statutory laws are compatible with the

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<sup>30</sup> *Judgment of 30 July 2001 No. 13-II in the case concerning the review of the constitutionality of the provisions of subsection 7 of section 1 of article 4, section 1 of article 77 and section 1 of article 81 of the Federal Law on 'Enforcement Proceedings', in connection with requests of the Arbitration Court of Voronezh region, the Arbitration Court of Saratov region and complaint by Joint Stock Company 'Razrez Izbylskiy'.*

<sup>31</sup> *Judgment of 19 January 2017* (n 1) 28.

<sup>32</sup> It declined to entertain the Ministry's claims regarding Yukos's alleged failure to exhaust local remedies and the ECtHR's lack of precision regarding the identity of the shareholders to whom satisfaction was owed, see *ibid* 29.

<sup>33</sup> *Judgment of 19 January 2017* (n 1) 30-31.

<sup>34</sup> *ibid* 30.

<sup>35</sup> *ibid* 31.

<sup>36</sup> If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied. Although the Russian Constitution does not clearly state the priority of the Constitution over international law it has been interpreted that way by the RCC. See, for example, *Judgment of 14 July 2015 N 21-II Verification of Constitutionality of Art. 1 of the Federal Law 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Its Protocols', Sections 1 and 2 of Art. 32 of the Federal Law 'On International Treaties of the Russian Federation', Sections 1 and 4 of Art. 11, Subsection 4 of Section 4 of Art. 392 of the Civil Procedural Code of the Russian Federation', Sections 1 and 4 of Art. 13, Subsection 4 of Section 3 of Art. 311 of the Arbitration*

domestic constitution is irrelevant; a statutory measure that does not breach the Constitution remains, in the hierarchy of sources, statutory law. For statutory law, the premium for not breaching the Constitution is to stay into existence, certainly not to acquire a constitutional status capable of trumping international obligations. What is allowed is not the same as what is required: it is difficult to envisage a genuine conflict of obligations between the ECtHR's judgment and the Russian Constitution, if no textual constitutional requirement is breached.

The RCC insisted on citing its own constitutional review of the challenged measures – resulting in a positive finding of constitutionality – as a decisive argument. Throughout the decision, there seems to be a constant juxtaposition of the reasoning of the RCC (which found the Russian measures to be constitutional) and that of the ECtHR (which found the same measures to violate the Convention). The RCC must have remarked the parallel to indicate the ECtHR's mistakes in application of the Convention's right to property, and the better course that its reasoning should have taken, using the RCC's application of the Constitution's right to property as a template.

This approach is objectionable for at least two reasons. First, any argument invoking domestic law to justify a breach of international law runs counter Article 27 of the Vienna Convention on the Law of Treaties (VCLT). The following section chronicles the development of Russian law that resulted in the RCC assuming the role of the final arbiter, deciding which judgments of the ECtHR cannot be executed. Second, the simple fact that a constitutional court has not found fault with a measure's constitutionality cannot *per se* rule out the possibility that such measure breaches the Convention. In this light, we analyse the specific reasoning of the RCC in the case, and its repercussions on the interplay between the Convention and Russian law.

#### *A. The Irrelevance of Domestic Law*

The first major problem with the RCC's judgment is the failure to mention Article 27 VCLT, which is all the more revealing since the RCC discussed the application of Article 26 VCLT. Whereas Article 26 VCLT simply postulates that international obligations must be honoured, Article 27 VCLT is more specific in that it expressly rules out the possibility of using domestic law as an excuse to avoid international obligations.<sup>37</sup>

The RCC's involved reasoning to carve an exception into Article 26 VCLT – or, more to the point, Article 46 of the Convention<sup>38</sup> – clashes head-on with the principle of Article 27 VCLT. This is not a novel scenario. In fact, the whole Russian legal order has been adjusting to accommodate the possibility of an outright rejection of selected ECtHR's judgments.

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*Procedural Code of the Russian Federation, Sections 1 and 4 of Art. 15, Subsection 4 of Section 1 of Art. 350 of the Administrative Court Proceedings Code of the Russian Federation, and Subsection 2 of Section 4 of Art. 413 of the Criminal Procedural Code of the Russian Federation in Relation to the request of the Group of the Members of State Duma (Parliament), <rg.ru/2015/07/27/ks-dok.html>.* Having said that the Russian Constitution is unambiguous as to the point that the statutory laws are subordinate to the rules of international law.

<sup>37</sup> Art 27 VCLT provides 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...'

<sup>38</sup> Art 46-1 ECHR states 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

This process commenced in 2015 with the RCC decision<sup>39</sup> that was prompted by a request made by 93 members of the Duma (Russian Parliament). They essentially questioned the constitutionality of the 1998 law requiring the enforceability of Strasbourg decisions in Russia,<sup>40</sup> in case of contradiction with the Constitution. Whereas the question was made in the abstract, it was widely believed that the request was motivated by the recent judgments of the ECtHR in the *Anchugov* and *Yukos* cases.<sup>41</sup> In its judgment, the RCC confirmed Russia's sovereignty and its right to avoid unconstitutional judgments by the ECtHR, pointing out that the matter of unconstitutionality might be the result of an unusual interpretation of the Convention carried out by the Strasbourg judges. The RCC declined to declare the 1998 law unconstitutional, but authorised the legislator to pass a law empowering the RCC to 'declare impossible to implement' certain ECtHR's judgments breaching the Constitution's core values. The legislator obliged,<sup>42</sup> and already in April 2016 could the RCC exercise its new powers in the *Anchugov* case.

In *Anchugov*, the ECtHR had found Russia in breach of the Convention for its blanket ban on prisoner voting,<sup>43</sup> enshrined in a provision of the Constitution.<sup>44</sup> In its judgment, the ECtHR had invited Russia to explore the available ways to bring its law into compliance with the Convention, without enjoining a specific process:

It is open to the respondent Government to explore all possible ways in that respect and to decide whether their compliance with Article 3 of Protocol No. 1 can be achieved through some form of political process or by interpreting the Russian Constitution by the competent authorities – the Russian Constitutional Court in the first place – in harmony with the Convention in such a way as to coordinate their effects and avoid any conflict between them.<sup>45</sup>

In other words, the ECtHR had suggested that an effort of consistent interpretation might be sufficient to bring Russian law into compliance with the Convention, without amending the Constitution. However, the Russian Ministry of Justice doubted whether compliance with this

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<sup>39</sup> *Judgment of 14 July 2015* (n 36).

<sup>40</sup> Federal Law of 30 March 1998 N 54-Φ3 'On Ratification of the Convention on protection of human rights and fundamental freedoms and the Protocols', <<http://base.garant.ru/12111157>>.

<sup>41</sup> See L. Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights. Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-Π/2015' (2016) 12 *European Constitutional Law Review*, 377, 379, for a careful reconstruction drawing also on the declarations of Russian officers. A few hours after the *judgment of 14 July 2015* (n 36) was delivered the Ministry of Justice of Russia released a statement that 'further actions of the Ministry of Justice in relation to the judgments of the European Court of Human Rights in cases *Anchugov* and *Gladkov v Russia* and *Yukos v Russia*, will be conducted in accordance with the legally binding position of the Constitutional Court of the priority of the Convention of the Russian Federation over the decisions of international tribunals.' V Nehezin, Ministry of Justice: the right not to enforce judgments of the ECtHR will be taken into account in the *Yukos* case (BBC Russia, 14 July 2015, in Russia, translated by the authors) <[http://www.bbc.com/russian/international/2015/07/150714\\_constitutional\\_court\\_echr](http://www.bbc.com/russian/international/2015/07/150714_constitutional_court_echr)>.

<sup>42</sup> Federal Law of the Russian Federation no. 7-ΦΚ3, introducing amendments to the Federal Constitutional Law no. 1-ΦΚ3 of 21 July 1994 on the Constitutional Court of the Russian Federation <<http://pravo.gov.ru/proxy/ips/?docbody=&nd=102384035&rdk=&backlink=1>>. The Venice Commission produced a critical assessment of these amendments, see Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court (Venice Commission, 10-11 June 2016).

<sup>43</sup> *Anchugov and Gladkov v Russia*, App No 11157/04, Judgment of 4 July 2013, finding a violation of Article 3 of Protocol 1.

<sup>44</sup> Article 32(3) of the Constitution of the Russian Federation: Deprived of the right to elect and be elected shall be citizens recognized by court as legally unfit, as well as citizens kept in places of confinement by a court sentence.

<sup>45</sup> *Anchugov and Gladkov v Russia* (n 43) para 111.

judgment was possible, given that the Russian Constitution expressly stated that prisoners cannot vote. Noting the clear provision of the Constitution and the impossibility of a conventional interpretation, the RCC declared the *Anchugov* decision impossible to enforce. In a somewhat unnecessary specification (the conflict emerged from the literal interpretation of the Constitution), the RCC also envisaged the possibility that a decision from Strasbourg be unenforceable when it collides not with the letter of the Constitution, but with its interpretation given by the RCC.<sup>46</sup> This hermeneutic collision occurred in *Yukos*.

Insofar as the RCC's interpretation of the Constitution operates as filter for international judgments' enforceability, it is easy to anticipate incidents of inter-system collision.<sup>47</sup> The RCC, effectively, arrogated to itself a power to shelter any statutory provision from effective review by the Strasbourg Court, by sanctioning its status as constitutionally required. This power ranges widely especially if the principle of 'state sovereignty' is deemed a core value of the Constitution. This principle might be used to grandfather any statutory law at odds with the Convention, in a self-serving circle. Namely, the measure would breach international law, but there would be a constitutional principle allowing Russia to preserve its sovereignty in the face of international obligations; as a result this measure would be safe, or any other that the RCC cares to rescue, for what matters).

Another 'core value' that the RCC mentions systematically (in 2015, in *Anchugov* and in *Yukos*) is the protection of fundamental rights. In essence, a Strasbourg decision would be impossible to enforce if it encroached on the protection of fundamental rights granted under the Constitution. This scenario is reminiscent of the various 'untouchable core' doctrines developed by national courts against the effects of the Court of Justice of the EU.<sup>48</sup> In that scenario, domestic courts wanted to reserve the right to contain the human-right impact of EU law – a faculty they have virtually never exercised. However, the doctrine appears to be ill equipped to justify resistance against the decision of a human rights court. By definition, the ECtHR's judgments against a State sanction that State's *failure* to uphold a fundamental right: it is hard to see how they could undermine the protection of fundamental rights. To the extent that several rights might be in tension, and the ECtHR indicates a balance (through proportionality) different from what the State measure entailed, one of the rights involved could lose out as a result of the international judgment, in favour of other fundamental rights. This *vulnus*, however, would be incidental to the better proportion identified by the ECtHR judges, and should ensure an overall better system of protection.

In essence, recourse to the concepts of 'state sovereignty' and fundamental rights protection causes the RCC to second-guess the overall desirability of ECtHR's judgments. These principles might

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<sup>46</sup> Judgment of 19 April 2016 No 12-II/2016 in the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia* in connection with the request of the Ministry of Justice of the Russian Federation <[http://www.ksrf.ru/en/Decision/Judgments/Documents/2016\\_April\\_19\\_12-P.pdf](http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf)>.

<sup>47</sup> As noted by Mälksoo (n 41) 388: 'Here everything depends on how Russia's constitutional identity will be constructed and which constitutional values will be emphasised by the Court'.

<sup>48</sup> See M. Claes, 'The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the European Court of Justice' (2016) 23(1) Maastricht Journal of European and Comparative Law 151; M. Claes, 'The primacy of EU law in European and in national law' in A. Arnulf and D. Chalmers (eds), *The Oxford Handbook of European Law* (OUP 2015) 178-211; J. Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9 European Constitutional Law Review 420.



suggest a high threshold of gravity. However, their construction might give rise to conflicts that are not mandated by the Constitution,<sup>49</sup> but occasion from the RCC's interpretation of what the Constitution requires. This scenario, which emerged in *Yukos*, does not apply only in cases of high-level constitutional conflicts. The puzzling repercussion of this loose standard of disobedience are analysed in the next section.

### B. Constitutionally Allowed is not Constitutionally Required

The second major problem of the *Yukos* judgment is that it seems to assume mistakenly that the constitutionality of a measure and its conformity with the ECHR go hand in hand.

To illustrate the problems of this approach, the saga regarding the Italian regime of compensation in case of unlawful expropriation for public purposes<sup>50</sup> can assist the analysis as a control case.<sup>51</sup> In certain circumstances, Italian law granted the dispossessed owners compensation lower than full market value. Moreover, the compensation formula, codified in statutory law, applied in compensation proceedings already pending before the law's entry into force (i.e., retroactively). The Italian Constitutional Court confirmed until 2002 the constitutionality of such regime, noting that full compensation is not always necessary (as the ECtHR often declares in right to property cases) and that retroactivity can be justified in non-criminal matters.<sup>52</sup> However, the ECtHR declared in 2006 that the Italian law breached Article 1, Protocol 1 of the Convention.<sup>53</sup> Thereupon, the same Italian measures were impugned again before the Italian Constitutional Court, for breach of the Constitution.<sup>54</sup>

The Italian Constitutional Court acknowledged the supra-statutory ranking of the Convention, as interpreted by the ECtHR. It contrasted its own previous conclusions with the ruling of the Strasbourg Court, and held that the balance struck in the past needed re-thinking, in line with Italy's international obligations. Even if potentially lawful under the Constitution, less-than-market value compensation contravened the Convention. This conflict alone, emerging from the ECtHR's formulation of a new and more precise standard of review, rendered the Italian measures also unconstitutional.<sup>55</sup> The Italian legislator, less than a month after the *revirement* of the Italian

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<sup>49</sup> Mälksoo (n 41) 389: 'This situation is no longer about open conflict with the text of the Russian Constitution like arguably was in *Anchugov and Gladkov*, but about further weighing, interpretation and value judgments'.

<sup>50</sup> More precisely, the issues concerned the phenomenon of acquisition by right of occupancy (*occupazione acquisitiva*), whereby the State acquires the property of an expropriated land by building public facilities on it, rather than by virtue of a formal expropriation order. For a fuller analysis, see F Biondi Dal Monte and F Fontanelli, 'The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System' (2008) 9 German LJ 9 889.

<sup>51</sup> Other examples could be brought, see for instance the *revirement* of the German Federal Constitutional Court in the *Von Hannover* case. Compare the judgment of the Constitutional Court BVerfGE 120, 180 (210) with the ECtHR's judgment in *Von Hannover v. Germany*, App no 59320/00, Judgment of 24 June 2004. Another example concerns the constitutionality of preventive detention, which had been confirmed in 2004 (see BVerfGE 109, 133) and then rejected in 2011 (BVerfGE 128, 326), in the wake of the ECtHR's decision in *M. v Germany*, App No 19359/04, Judgment of 17 December 2009.

<sup>52</sup> See decisions No. 148/1999; 396/1999 and 24/2000, and orders No. 251/2000 and 158/2002.

<sup>53</sup> *Scordino v Italy* (no. 1) [GC], App No 36813/97, Judgment of 29 March 2006.

<sup>54</sup> Article 117 of the Italian Constitution provides that legislative powers be exercised in compliance with Italy's international obligations, including those deriving from the Convention.

<sup>55</sup> Joint Judgments 348 and 349/2007 of 24 October 2007.

Constitutional Court, changed the law<sup>56</sup> to comply with the ECtHR's judgment, and the Supreme Court applied the new calculation criteria shortly thereafter.<sup>57</sup>

In essence, the critical elements of this case are the same of the *Yukos* scenario. Like in Italy, in Russia the Convention has quasi-constitutional status: it displaces domestic statutes but not the Constitution itself. Like in Italy, the Russian statutory measures' constitutionality had been challenged unsuccessfully, and the Constitutional Court's decision had used a test comparable to the ECtHR's own – a scrutiny of the proportionality of the restriction of property rights. Like in the Italian case, the ECtHR had essentially struck a different balance and found that the Russian restrictions were, in ultimate analysis, disproportionate. Here stop the commonalities. The Italian Constitutional Court, mindful that ECHR law 'lives in the interpretation given by the ECtHR on it',<sup>58</sup> adopted the ECtHR's views on proportionality as good law. Instead, the Russian Court rejected them and stuck to its own proportionality analysis, essentially challenging the legal authority of the ECtHR's judgment.

*Yukos* was not the first case in which the ECtHR found fault with Russian statutory measures that the RCC had previously ruled to be constitutional. The RCC declared that inability to get a paternity leave for a military serviceman was compatible with the Constitution,<sup>59</sup> but the ECtHR subsequently found in *Konstantin Markin v Russia* that this measure breaches the Convention.<sup>60</sup> In *Khoroshenko v Russia*, the ECtHR found Russia in violation of the Convention for not allowing long-term family visits to life-long prisoners during the first decade of their imprisonment.<sup>61</sup> The RCC had beforehand declared inadmissible a challenge of constitutionality aimed at the measure.<sup>62</sup> In neither case did the RCC react hostilely to the ECtHR's decisions, questioning their legal authority. It did so in the *Yukos* judgment.

This element of *Yukos* sets it apart from other instances of disobedience to international decisions. Occasionally, a domestic court invokes the right to disobey international decisions when, irrespective of their legal tenability, their implementation would undermine some core values of the domestic legal order. In the case at hand, instead, most of the Russian Court's reasoning focused rather on the specific proportionality test carried out by the two courts, respectively, on the same measures: the constitutionality of the Russian laws should have entailed, by extension or by analogy, their conventionality too.<sup>63</sup> This argument is one that – through *de novo* review – challenges the *correctness* of the ECtHR's decision, not one that simply recommends disobedience to avert the risk of a constitutional crisis.<sup>64</sup> The RCC's apparent concern is not so much the gravity

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<sup>56</sup> Italian Law no. 244 of 24 December 2007, Art 2, para 89.

<sup>57</sup> Italian Supreme Court, Decision No. 8384 of 30 March 2008.

<sup>58</sup> Judgments 348/2007 (n 55), para 4.7: "le norme della CEDU vivono nell'interpretazione che delle stesse viene data dalla Corte europea".

<sup>59</sup> *Ruling of 15 January 2009 about the rejection to consider the complaint by Markin Konstantin Aleksandrovich of violation of his constitutional rights* <<http://doc.ksrf.ru/decision/KSRFDecision18793.pdf>>.

<sup>60</sup> *Konstantin Markin v Russia* [GC], App No 30078/06, Judgment of 22 March 2012.

<sup>61</sup> *Khoroshenko v Russia* [GC], App No 41418/04, Judgment of 30 June 2015.

<sup>62</sup> *Ruling of 21 December 2006 about the rejection to consider the complaint by Khoroshenko Andrey Anatolievich of violation of his constitutional rights* <<http://doc.ksrf.ru/decision/KSRFDecision15613.pdf>>.

<sup>63</sup> While discussing a similar aspect of the RCC decision in the case of *Anchugov and Gladkov*, Mälksoo points out that 'this seems to be in the first place a warning of the Constitutional Court to the Strasbourg Court to be careful when critically dismissing judgments of the former'. Mälksoo (n 41) 389

<sup>64</sup> We do not expand here on the second-order critique raised by the RCC against the interpretive canon used by the ECtHR to interpret the Convention, chastised as being 'unusual'.

of the consequences of complying with the ECtHR's judgment, but the alleged mistakes in its reasoning.

This impression, however, might flow from the RCC's disguising of its real preoccupation, which did in fact lie with the judgment's practical consequences rather than its reasoning. It can be argued that the RCC, in line with the Ministry's request of constitutionality review, was more concerned with the massive order of compensation than with any matter of principle raised by the judgment's implementation. Some circumstantial evidence would support this reading.

First, it does not transpire from the judgment of the RCC that Russian constitutional system is actually threatened by the ECtHR's *Yukos* judgments to the extent necessary to clear the 'impossible to execute' line. Even though the RCC mentioned a flurry of constitutional provisions variously relating to Russia's sovereignty,<sup>65</sup> to raise the stake of the collision, the key legal ground of constitutional review used in this case was Article 57 of the Constitution, which simply sets the duty to pay taxes and the non-retroactivity of tax law.<sup>66</sup> Article 57, taken alone, could hardly codify a core constitutional principle (the Constitution itself identifies only its first 16 articles as the core provisions); that is why to justify its resorting to putatively extreme measures the RCC had to somehow connect Article 57 with all these other provisions. More importantly, the mere fact of paying Strasbourg-ordered compensation, relating to some element of over-charging in tax assessment, cannot possibly undermine such hypothetical core value, let alone to a serious extent.

Second, while the challenge concerned the judgment of just satisfaction, the RCC's decision spent an inordinate amount of reasoning criticising the ECtHR judgment on the merits.<sup>67</sup> This lack of alignment is understandable: the order of just satisfaction is a routine consequence of ECtHR proceedings, one that every Contracting Party to the Convention is used to facing. It is not easy to mount a principled challenge against a judgment on just satisfaction as such,<sup>68</sup> and the mere inconvenience of this specific judgment – given its magnitude – cannot be characterised as a legal threat to Russian constitutional order.<sup>69</sup> It is therefore understandable that the Ministry – and the

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<sup>65</sup> Reference is made to the norms that confirm Russia's sovereignty over its territory and the supremacy of Russian law thereupon (Article 4, paragraphs 1 and 2); the higher rank of the Constitution over other domestic laws (Article 15, paragraph 1); the automatic priority of international law over domestic law (Article 15, paragraph 4); the priority of the core Constitutional principles – among which all the above – over the rest of the Constitution (Article 16, paragraph 2); and the possibility for Russia to delegate powers through international treaty-making, if that exercise does not restrict fundamental rights or contradicts 'the principles of the constitutional system' (Article 79).

<sup>66</sup> Article 57 in conjunction with Articles 15 (Sections 1, 2 and 4), 17 (Section 3), 19 (Sections 1 and 2), 55 (Sections 2 and 3) and 79.

<sup>67</sup> Of course, the possibility to declare enforcement impossible only arose with the 2015 law, after the judgment on liability. Therefore, the liability decision – and the reasoning thereof – should have been immune from the RCC's scrutiny.

<sup>68</sup> Consider, in a different field of law, the remarks of a US judge called upon to declare whether an arbitral award ordering a State to pay compensation should be denied enforcement for contravening public policy: 'enforcing this award does not risk violating public policy. The award does not interfere with Venezuela's environmental rules or regulations, but only requires Venezuela to compensate Crystallex for the results of its inequitable actions and expropriation. Venezuela fails to meet the demanding threshold by demonstrating that holding it to the terms of its own treaty would violate our basic notions of morality or justice'. United States District Court for the District of Columbia, 25 March 2017, p. 28, <[https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2016cv0661-32](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2016cv0661-32)>.

<sup>69</sup> The Venice Commission opined prior to the *Yukos* judgment that '[i]t is very difficult to conceive that an order for payment of a sum of money may be found to be unconstitutional in the light of Chapters 1 and 2 of the Constitution.' Final Opinion (n 42) para 30

RCC – concentrated their efforts on the precursor of just satisfaction (the proportionality test leading to a finding of breach), rather than its consequences (Russia’s duty to make the payment).

In other words, whilst apparently dealing with the remedy the RCC is in fact re-assessing the ECtHR’s judgment on the merits. This disconnect might be revealing. The RCC framed its decision as one of dualism: being fully cognisant of the immunity of ECtHR’s judgments from domestic review, the RCC must nevertheless sanction the unconstitutionality of the domestic acts required to implement them. However, its reasoning is, in several passages, one that betrays the monist ambitions of RCC: the Russian judges ultimately explained why the Court of Strasbourg was wrong *as a matter of Convention law* and, therefore, why this ruling is essentially invalid or at least ineffective *ab origine*.

#### IV. CONCLUSION: UNPRINCIPLED DISOBEDIENCE

The RCC is not the only domestic authority refusing compliance with international decisions. Several other instances can be made. For the purpose of this comment, we isolate some other instances of possible or actual disobedience to ECtHR’s judgments.

Dzehtsiarou and de Londras have divided disobedience to ECtHR judgments into principled disobedience and dilatoriness.<sup>70</sup> The former is based on a reasonable disagreement about human rights,<sup>71</sup> in which the objections of the respondent State reflect its constitutional identity; the latter is mere unwillingness to transfer the necessary authority to the ECtHR, expressed through problematic attitudinal and/or organisational resistance. Disobedience unsupported by a reason (or supported by preposterous reasons that disguise mere unwillingness) frustrates all attempts at dialogue and elaboration, as know very well those who remember the story of Bartleby, who declined all assignments on the workplace with a simple ‘I would prefer not to’.<sup>72</sup>

Of course, disobedience is usually presented as principled disobedience. The true intentions can be fathomed by reference to the State actions that undermine the authority and the legitimacy of the Strasbourg Court. In other words, in cases of unprincipled disobedience, the State is not concerned about the principles but about the consequences of the Strasbourg judgments, such as the amount of compensation, the power sharing arrangements required to comply, or other practical repercussions at the national level. In Germany, the Constitutional Court reserved some space for principled disagreement in its *Görgülü* decision.<sup>73</sup> In the UK, the mirror principle of application of the ECtHR law also leaves the national judges with the discretion of how to implement controversial judgments.<sup>74</sup>

From an international law point of view, there is hardly any difference between principled disagreement and dilatoriness: irrespectively of the justification, non-implementation of the

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<sup>70</sup> F de Londras and K Dzehtsiarou, ‘Mission Impossible? Addressing Non-execution through Infringement Proceedings in the European Court of Human Rights.’ (2017) 66 ICLQ 467.

<sup>71</sup> On reasonable disagreement, see for example J Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 Yale Law Journal 1346.

<sup>72</sup> H Melville, ‘Bartleby, the Scrivener’ in *The Piazza Tales* (Dix & Edwards 1856)

<sup>73</sup> *Görgülü* 2 BvR 1481/04 (14 October 2004) BVerfGE 111, 307 (Ger). See also K Dzehtsiarou and N Mavronicola, ‘Relation of Constitutional Courts / Supreme Courts to the ECtHR’ Max Planck Encyclopedia of Comparative Constitutional Law (forthcoming, on file with the authors).

<sup>74</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26 (UK).

judgments of the ECtHR is a violation of Article 46 of the Convention. The purported inability of implement the judgment in *Hirst No 2 v the UK*<sup>75</sup> is as illegal as Russia's failure to enforce *Yukos*.

Nevertheless, there is a difference on the level of legitimacy of the state actions. Even if the constitutional structure leaves some space for principled disagreement this space is often filled by the willingness to find a solution to the constitutional confrontation between the national law and the ECtHR. In Italy, for instance, the Convention has quasi-constitutional status: it can be used to invalidate statutory law (as part of the *bloc de constitutionnalité*<sup>76</sup>) but cannot trump the norms of the Constitution. Hence, the system suggests that there can be a principled disagreement between the ECHR and the Italian Constitution. This particular setup, however, concerns the respective position of the sources in the domestic system and does not implicate that ECtHR's decisions can be reviewed for constitutionality, or rejected. First, the possibility that there is a conflict between the Constitution and the Convention that cannot be moderated through consistent interpretation is remote. Second, a potential conflict would more likely trigger constitutional reform than a deliberate disregard of the ECtHR's decision.<sup>77</sup>

Of course, it is possible in the abstract that some judgments of the ECtHR impose such obliteration of a constitutional value or fundamental right that the Italian or German authorities question the constitutionality of the required measures. In principle, the scenario is comparable to that of the execution of *Yukos*. What is lost in the comparison is the actual import of this safety-valve scenario. In *Yukos* the RCC did not point to an ECtHR-made doctrine that would frustrate an essential component of its constitutional identity, but only to an (allegedly) wrong decision. The RCC merely reflected the considerations of dilatoriness that do not call for dialogue but halt it.

The RCC's judgment in *Anchugov*, taken alone and not as a strategic precursor for the subsequent *Yukos* judgment, can be considered as an episode of principled disagreement. After *Anchugov*, Russia should have modified its laws on prisoners' voting, possibly also Article 32 of its Constitution. This kind of systemic change is harder to implement and is politically harder to digest – the post-*Hirst* scenario in the UK is similar in this respect. Conversely, compliance with the *Yukos* decision would only entail a one-off financial loss, which is huge only because it is measured upon the value of the possessions taken.<sup>78</sup> The systemic effects on Russian law are minor: after *Yukos*, Russian authorities are simply reminded to avoid retroactive tax assessments (but the legislator is free to readjust the application of the time-bar, for the future) and to avoid the rigid application of steep enforcement fees that unnecessarily harm the taxpayer. In other words, enforcing the *Yukos* judgment would not do violence to the Constitution: even if retroactive

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<sup>75</sup> In 2005, the ECtHR declared that total disenfranchisement of prisoners in the UK is a violation of Article 3 of Protocol 1. See *Hirst v the United Kingdom (no. 2)* [GC], App No 74025/01, Judgment of 6 October 2005. From this judgment the whole line of prisoner voting case law originated, *Anchugov* was one of the follow-ups. The UK disagreed with this judgment using vocabulary of principled disagreement.

<sup>76</sup> L Favoreu, 'Bloc de constitutionnalité', in O Duhamel and Y Mény (eds), *Dictionnaire constitutionnel* (Puf 1992) 87. The same mechanism is in place in France, with the difference that the review of compatibility of domestic law with the Convention, instead of being the prerogative of the Conseil Constitutionnel, is carried out also by the ordinary judges, who can set domestic statutes aside without voiding them, see O Dutheil de Lamothe, 'Contrôle de constitutionnalité et contrôle de conventionnalité', in *Juger l'administration, administrer la justice. Mélanges en l'honneur de Daniel Labetoulle* (Dalloz 2007) 315.

<sup>77</sup> There are many examples when incompatibility with the ECHR triggered constitutional reforms for example in Turkey, Slovenia etc.

<sup>78</sup> For reference, consider the US\$ 50 billion evaluation of *Yukos's* possession carried out by the PCA arbitral tribunal, after a 25% deduction for contributory fault.

assessments of recalcitrant taxpayers were effectively allowed under the Constitution, they would hardly be mandated by it. The RCC essentially refused to carry out its duty to find a consistent interpretation of its Constitution that would also align with the interpretation of the Convention given by the ECtHR. In *Yukos*, the RCC tried to cover up its dilatoriness through a flood of references to the constitutional principles. However, the gulf between the Constitution's terse text and the involved reasoning of the *Yukos* judgment tries so hard to disguise the true intentions of the RCC that they surface all too clearly.